## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: January 14, 2010

TO : Daniel L. Hubbel, Regional Director

Region 17

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Host International at KCI Airport 530-4090-3000 530-4090-4000

Cases 17-CA-24666 and 24712 530-5400

530-6067-4033-8600

530-8081-6900

The Region submitted these cases for advice as to whether the Employer violated Section 8(a)(5) by refusing to bargain with and remit union dues to Local 64 and/or the Chicago and Midwest Regional Joint Board (Joint Board) after the Local first disaffiliated from UNITE HERE along with the Joint Board, and subsequently left the Joint Board to reaffiliate with UNITE HERE. We conclude that at all relevant times, Local 64 has been the employees' Section 9(a) collective-bargaining representative, and accordingly, the Employer violated Section 8(a)(5) by refusing to bargain with and remit dues to Local 64.

## **FACTS**

Respondent Host International employs a unit of restaurant and bar employees at Kansas City International airport (KCI). Charging Party UNITE HERE Local 64 has represented Host (and previously, Marriot Host) employees at KCI for approximately 20 years. Local 64 was first affiliated with HERE and, after the 2005 merger of the International Unions, with UNITE HERE, at which time it further affiliated with Joint Board, a UNITE HERE constituent body.

For approximately the last 16 years, Beverly Alery served as a business representative with authority over Local 64's bargaining units. Although her duties have not substantially changed, Alery has been successively employed by HERE, UNITE HERE, the Joint Board, and currently by UNITE HERE again. As business representative, Alery, alongside Local 64 bargaining committees, has negotiated the past six successive collective bargaining agreements. Stewards elected by Local 64's membership process grievances at the first two stages; if unresolved, Alery reduces the grievance to writing and meets with the

Employer. A grievance brought by a Host employee has not gone past this step and to arbitration for many years. Alery was president of Local 64 until the 2005 merger of UNITE and HERE; David Withers succeeded her as Local 64 president, a position he holds today. As president, Withers has chaired periodic meetings of the Local's executive board (which Alery also attends as business representative), membership meetings held approximately every three months and, until recently, grievance meetings. Withers has visited the Host job site approximately every week to speak with employees and administer the contract.

The affiliation agreement between the Joint Board and Local 64 provided that, it would "remain the responsibility and prerogative of Local officers and stewards to administer current collective bargaining agreements of the Local, with the assistance and support of representatives of the Joint Board where appropriate." At the same time, the agreement provided for the transfer of the Local's dues, initiation fees, and service fees to the Joint Board. Accordingly, in 2005 the Local advised Host that it should remit dues collected through employee Union dues checkoff assignments directly to the Joint Board, rather than to the Local, as was the previous practice. Correspondingly, the Joint Board assumed responsibility for the Local's expenses, while the Local retained its tangible assets, such as office space and telephone.

Employees and Restaurant Employees Local Union 64, AFL-CIO" as the payee. After the Local's affiliation with the Joint Board, Alery blacked out any reference to HERE on the card, leaving the Local's name alongside the Joint Board's acronym ("CMRJB"), which she wrote in by hand. In explanation of how to rescind dues authorization, the cards refer, among other things, to the collective bargaining agreement between the Employer and the union named on the card, despite the fact that the Joint Board has never entered into a contract with Host under its own name.

The Joint Board's Constitution provides that all collective-bargaining agreements are to be executed in the name of the Joint Board. Nonetheless, contracts, including the 2007 agreement entered into during the Local/Joint Board affiliation period, identify only the Local, both on the title page and in the Recognition clause. The entire Union bargaining team signed the 2007 agreement; Alery signed as "business agent" without reference to the Joint Board, which the agreement does not mention in any way.

In March 2009, the Joint Board and affiliated Locals, including Local 64, disaffiliated from UNITE HERE. Numerous disaffiliated Joint Boards and Local Unions subsequently joined together to form Workers United, which in turn affiliated with the SEIU. UNITE HERE, however, disputes the disaffiliations. The Employer thus received conflicting demands for employee dues and, as a result, has escrowed all dues rather than remit them to the Local, the International, or the Joint Board.

Local 64 and the Joint Board's disaffiliation from UNITE HERE resulted in virtually no change in the unit employees' representation. Alery, along with the same Local officers, executive board members, and stewards, continued to serve unit employees. Dues rates remained unchanged, and no initiation fees were assessed upon affiliation with Workers United and the SEIU. The Local continued to hold meetings according on the same schedule. However, the Employer announced that, due to the confusion surrounding the multiple demands for recognition, it would no longer attend grievance handling meetings with Local or Joint Board officials. Thus, since disaffiliation, only the local and chief stewards have met with the Employer to resolve grievances.

In October, Local 64 disaffiliated with the Joint Board and Workers United/SEIU and reaffiliated with UNITE HERE. The reaffiliation entailed few changes in Local 64's operations. Local officers, shop stewards and executive board members retained their positions, and Alery is now employed by UNITE HERE to serve as Local 64's business representative. The Local's office location and telephone line have not changed. However, the Local has recently demanded that the Employer remit dues to it and it now pays its own expenses.

Local 64 filed the instant charge in Case 17-CA-24712, alleging that Host is violating Section 8(a)(5) by refusing to recognize the Union as unit employees' representative and remit dues to it. The Joint Board filed the charge in Case 17-CA-24666, alleging that Host violated Section 8(a)(5) by, among other things, refusing to process grievances and withholding and failing to remit Union dues.

## ACTION

We conclude that Local 64 has been and continues to be the exclusive Section 9(a) representative of the Host bargaining unit, and accordingly, that the Employer violated Section 8(a)(5) by refusing to recognize and remit dues to the Local after its disaffiliation from and reaffiliation with UNITE HERE.

An employer's obligation to bargain extends only to the statutory representative selected by a majority of the unit employees. While the Section 9(a) representative may delegate some authority to an agent to act on its behalf, it cannot delegate all its responsibilities to another union and demand that the employer bargain with that union. The Board has found an improper delegation of representation where there had been a wholesale substitution of another union for the designated Section 9(a) representative.

Here, Local 64 has been and remains the employees' Section 9(a) representative. Evidence establishes that, rather than supplanting the Local through an improper delegation of representational responsibilities, during the affiliation peroid, the Joint Board only acted as the Local's agent in managing its dues monies and paying its expenses.

Prior to disaffiliation from UNITE HERE, Host had recognized and dealt with Local 64 as the exclusive representative during successive collective-bargaining

<sup>1</sup> See, e.g., Nevada Security Innovations, Ltd., 341 NLRB 953, 955 (2004).

<sup>&</sup>lt;sup>2</sup> Compare Nevada Security Innovations, Ltd., 341 NLRB at 953, fn.1, 953-56 (employer violated Section 8(a)(5) by refusing to bargain with certified representative, the International, where the International had merely delegated some of its duties to its Local); Mountain Valley Care & Rehabilitation Center, 346 NLRB 281, 282-83 (2006) (same); with Goad Co., 333 NLRB 677, fn.1, 679-80 (2001) (where Section 9(a) representative improperly sought to transfer all its representational responsibilities to its sister Local, the employer lawfully refused to bargain with the sister Local).

<sup>&</sup>lt;sup>3</sup> See Goad Co., 333 NLRB at 679-80 (agreement between Section 9(a) representative and its purported "agent" "stands the law of agency on its head" by absolving the principal for the actions of its own purported agent and confirmed that the principal was "bowing out" of its representational duties); Sherwood Ford, Inc., 188 NLRB 131, 133-34 (1971) (resolution provided that Section 9(a) representative would carry out instructions of its purported agent, and "it was there that the switch became manifest, for the dog had now become the tail").

agreements stretching back approximately 20 years. Each contract designated the Local as the exclusive collective bargaining representative. Alery, in her capacity as HERE/UNITE HERE business representative, was the principal negotiator of those agreements and executed them (along with Local 64's hierarchy) on behalf of Local 64. During the affiliation period between Local 64 and the Joint Board, full-time Local 64 officers and stewards, along with Alery, were responsible for administering those agreements and played a substantial role in grievance handling. Local president Withers maintained a weekly presence at the Host facilities. He ran periodic meetings of the Local executive Board and grievance committee, as well as membership meetings, and the Local retained its office and phone number throughout. Many grievances were resolved by stewards appointed by the bargaining unit, and Alery handled the rest without reference to the Joint Board for arbitration. The affiliation's primary substantive change having the Joint Board pay the Local's bills and attend to its financing - had no effect on representation of unit employees. Further, although Alery was employed during this period by the Joint Board rather than the International, she maintained consistent interactions with the Local hierarchy throughout. Accordingly, we conclude that Local 64 was the exclusive collective-bargaining representative at the time of the Local's and Joint Board's disaffiliation from UNITE HERE in March 2009.

An employer's obligation to recognize and bargain with the incumbent union following a change in affiliation continues "unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative." In determining whether there is "substantial continuity" in representation, the Board examines "the totality of the circumstances," and considers a number of factors, including the union officials' responsibilities, membership rights and duties, the dues/fees structure, governing documents, the manner in which contract negotiations and administration are handled, and the representative's assets.

 $<sup>^4</sup>$  Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143, 147 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

<sup>&</sup>lt;sup>5</sup> Mike Basil Chevrolet, 331 NLRB 1044, 1044 (2000) (amending certification to reflect change in affiliation).

<sup>&</sup>lt;sup>6</sup> See <u>Western Commercial Transport</u>, 288 NLRB 214, 217 (1988) (dismissing petition to amend certification where affiliation effected "dramatic change" in the bargaining representative).

Applying those principles here, we conclude that Local 64 continued as the Section 9(a) representative, both after its disaffiliation from UNITE HERE and subsequent disaffiliation from the Joint Board/Workers United. The identity of Local officers, executive board members, and stewards remained substantially the same. Union membership rights or dues did not change. The Local's handling of contract negotiations and administration was substantially unaltered, and the Local retained its status as collective bargaining representative per the terms of the 2007 agreement (in apparent violation of the Joint Board's constitution).

Likewise, Local 64's subsequent reaffiliation with UNITE HERE was marked by a similar continuity in representation. Once again, the Local officers, representatives, and stewards continued to exercise the same functions as before, and dues remained constant (although the Local now directed Host to remit dues directly to it, rather than to the Joint Board). Alery retained her role, now as a UNITE HERE representative rather than an employee of the Joint Board. Contract administration continued to be the responsibility of Alery and the Local representatives, and the Local's phone number and office location remained the same. Thus, the totality of circumstances indicates that UNITE HERE Local 64 continues to represent the Host bargaining unit.

We further conclude that the Employer violated Section 8(a)(5) by unilaterally refusing to remit checked-off dues to the Local. A dues checkoff authorization is a contract between an employee and his or her employer. In interpreting a contract such as an authorization card, if there is any ambiguity in contract terms, the Board will examine extrinsic evidence to determine the parties' intent. Relevant extrinsic evidence includes "a past

<sup>&</sup>lt;sup>7</sup> Electrical Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322, 327 (1991) (holding union violated Section 8(b)(1)(A) by continuing to accept checked-off dues after employee resigned from union membership).

<sup>8</sup> See <u>Des Moines Register and Tribune Co.</u>, 339 NLRB 1035, 1037 (2003), review denied sub nom. <u>Des Moines Mailers</u> <u>Union, Teamsters Local 358 v. NLRB</u>, 381 F.3d 767 (8<sup>th</sup> Cir. 2004).

practice of the parties in regard to the effectuation or implementation of the contract provision in question ...."

In the past Alery distributed two types of cards to unit employees. One card named only Local 64 and unambiquously designated that Union as the lawful recipient of withheld dues (that card is used exclusively since the Local's reaffiliation with UNITE HERE). However, during the affiliation period between the Local and the Joint Board, the cards named both Local 64 and the Joint Board (using its acronym, CMRJB) as the designated Union. However, in describing the duration of the authorization, the cards refer to a collective-bargaining agreement between "the union" and the Employer. These cards are ambiguous to the extent that they identify both the Local and the Joint Board as the "union." There is no collective bargaining agreement between Host and the Joint Board or the Joint Board and the Local together; all contracts have consistently named only the Local as the collective bargaining representative.

In light of this facial ambiguity, we examine extrinsic evidence, which indicates that parties to checkoff authorization intended dues to be remitted to the Local as the employees' collective bargaining representative. The Employer had forwarded dues to the Local until the Local designated the Joint Board as recipient during the affiliation period. Thus, the Employer had consistently remitted dues to the employees' current collective bargaining representative, without apparent complaint from any employee. There is no evidence that Alery distributed authorization cards naming both the Joint Board and the Local because any employee wished to remit dues specifically to the Joint Board. Rather, the presence of the Joint Board's acronym on the authorization cards appears to reflect the Local's decision to use the Joint Board as a financial resource to pay its bills, rather than to accord it status as employees' collective bargaining representative.

<sup>9</sup> Mining Specialists, 314 NLRB 268, 269 (1994).

Accordingly, the Employer's failure to recognize Local 64 as collective bargaining representative, as evidenced by its refusal to meet with its representatives and to remit dues, violates Section 8(a)(5).

B.J.K.